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IN THE

Supreme Court of the United States

October Term, 1970

70-293

No. ~~1838~~

ANTHONY V. ALLESSANDRINI, a/k/a Tony Aless,
Petitioner,

v.

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES and CANADA and ASSOCIATED MUSICIANS OF GREATER NEW YORK, LOCAL 802, AFM-CIO,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES and CANADA and ASSOCIATED MUSICIANS OF GREATER NEW YORK, LOCAL 802, AFM-CIO,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Anthony V. Allessandrini, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on March 18, 1971.

Opinions Below

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto, pp. 1a-2a. The opinion and judgment of the District Court for the Southern District of New York, appears in the Appendix hereto at pp. 3a-7a.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered March 18, 1971. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Where the collateral estoppel found by the courts below is ultimately based upon Respondents' "arbitration" and "award", which are themselves a patent and substantial exemplification of Respondents' unfair representation, may such unfair representation be immunized from challenge by the technicalities of collateral estoppel which the courts below held to preclude Petitioner?

2. Where Judge Motley's judgment is squarely based on a contention of collateral estoppel by virtue of Judge Tyler's earlier judgment; and where Judge Tyler's judgment is squarely based upon Respondents' "arbitration award", which Judge Tyler regarded as *res judicata* and which Petitioner contends is itself substantial proof of Respondents' unfair representation, were the courts below in error in dismissing Petitioner's complaint?

3. Was Petitioner denied substantive due process by the courts below because of their ultimate reliance herein upon a spurious "arbitration" procedure and "award" which were themselves characterized by gravely undue process and which themselves revealed Respondents' unfair representation?

4. Where, as here, Respondent Unions: (a) over a period of almost ten years, failed to enforce Petitioner's rights under labor contracts with CBS; (b) failed to render a decision on Petitioner's claim filed July 1, 1964, until

February 9, 1966; (c) denied plaintiff access to the Courts during said long delay; (d) required Petitioner during that time, to present witnesses at a trial before the Local 802 Executive Board and later to submit to an alleged "arbitration" before the International Executive Board; (e) as such "arbitration" permitted no examination or cross-examination of witnesses and no hearing of Petitioner's or his attorney's oral arguments; (f) obviously made their final decision upon the basis of a perverse reading of the applicable labor contracts and of the minutes of the hearings conducted by the Local 802 Executive Board; (g) by said perverse reading of contracts and minutes construed them in such a manner as to completely contradict their clear meaning; (h) rendered a final decision or "award" which completely neglected the sole, uncontradicted and substantial evidence before the "arbitrators"; and (i) based decision on a complete neglect of the clear and patent meaning of the provisions of the applicable labor-contracts: may Respondent Unions escape accountability for the aforementioned unfair representation, which caused Petitioner a loss of contract-required salaries totalling $122,384.21, simply by rendering an irresponsible "award", based on no evidence whatever and contradicting and repudiating the substantial and only evidence before the "arbitrators".

Statutory Provisions Involved

1. Section 101(a)(4), Labor-Management Reporting and Disclosure Act of 1959:

> "(4) Protection of the Right to Sue.—
> No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right

of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: Provided, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof: And provided further, That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition".

Statement of the Case

Under the name, Tony Aless, Petitioner was employed by Columbia Broadcasting System, Inc. (CBS) as a staff musician, in the orchestra which provided live music for the Jack Sterling Radio Show, from February 22, 1954 to July 4, 1964. Then live music was discontinued by CBS. Aless is and at all relevant times was a member of both Respondent Unions, which had labor contracts with CBS covering Petitioner. During the aforesaid period, Petitioner was *orchestra leader* of the Jack Sterling Radio Show; but, in violation of the applicable labor contracts, he was paid *as a sideman* (instrumentalist) and not *as a leader* (conductor). Said labor contracts required that the orchestra leader of an ensemble comprising six or more employee-musicians receive a salary 75% greater than the salary specified for a sideman. Respondent Unions admittedly never gave to CBS a dispensation from this 75% contract provision, covering Petitioner (A-50, A-51, A-55). Nevertheless, CBS told Petitioner that such a dispensation had been negotiated (A-50). Petitioner believed this CBS representation both because, as he testified: "I did not think CBS would lie", and because he relied on Respondent Unions, as his statutory repre-

sentatives, to enforce the involved labor contract as written or as modified by dispensation or other special arrangement.

In June, 1964, CBS terminated the employment of the entire Jack Sterling orchestra, suddenly and without explanation (A-100). As a result, Petitioner complained to Respondent, Local 802, requesting it to collect for him all moneys then due under the (at that time) *new* labor contract. In a conversation at that time with Lou Critelli, Secretary of Respondent Local 802, Petitioner learned for *the first time* that CBS had misrepresented about a "dispensation"; and had been violating, for about ten years, its labor contracts which mandated a 75% wage-increment for Petitioner, as orchestra leader (A-57, #6; A-76, #6; A-103). This long-standing and repeated violation of the labor contracts had survived repeated, regular (but obviously negligent and superficial) visitations by Local 802 delegates to the Jack Sterling Show and many filings of the AFM's "Form B" contracts, which had received that Local's approvals.

Petitioner, therefore, filed with Respondent, Local 802, and his employer a claim against CBS "for accrued monies due him as leader on the Jack Sterling Radio Show since February 22, 1954" (A-25). Petitioner's written claim against CBS dated July 1, 1964 (A-27) and was part of a procedure required (A-64) by Article 9, entitled "Claims and Arbitrations", of Respondent AFM's bylaws (reproduced in the Appendix to this Petition).

It needs emphasis that said AFM bylaw procedure (a) requires the General Executive Board of AFM to serve as "arbitrators" of all claims; while the National Labor Relations Act requires these same Board members to serve as statutory representatives of AFM members; and (b) *does not*, and in the matter of Petitioner's claim *did not*, require an arbitrational *hearing* with examination and cross-examination of witnesses. Nor does said procedures

allow representation of claimants by attorney; nor even oral argument by attorney. Nevertheless, compliance with Article 9 aforesaid is made "the sole and exclusive remedy for breach of contract by * * * employers (or purchasers of services and booking agents" (Article 9, Sec. 6(b)(1); A-64).

After the filing of Petitioner's claim, and after preliminary efforts by Respondent, Local 802, to settle the case with CBS had failed, the Executive Board of Local 802, on December 17, 1964, and December 24, 1964, conducted hearings on Petitioner's claim at which sixteen witnesses testified, establishing *without contradiction* all elements of Petitioner's claim as follows:

1. Aless performed all of the functions of orchestra leader or conductor while he was a CBS staff musician on the Jack Sterling Radio Show (A-27, A-29, A-31, A-33, A-35, A-37, A-38, A-39, A-40, A-41, A-43, A-44, A-47, A-48ff, A-55).

2. Jack Sterling was the regular drummer in the Show's orchestra (A-28, A-29, A-30, A-31, A-32, A-34, A-40, A-41, A-42, A-45, A-49, A-55).

3. The Show's orchestra comprised at least six (6) musicians, including Petitioner (A-50, A-51, A-99ff).

4. The labor contracts required the employer (CBS) to pay the 75% salary increment to the orchestra leader (A-7; ¶ 17 and ¶ 18).

5. In violation of the said labor contracts, CBS had never paid to Petitioner the 75% salary increment aforesaid (A-46, A-47, A-50, A-51, A-54).

Despite the uncontradicted evidence supporting Petitioner's claim, Respondent, Local 802, rendered no decision on the basis of the two hearings (A-27 through A-55). Instead, after long delays, Local 802 referred Petitioner's

claim against CBS to the International Executive Board for processing under Article 9 of the AFM bylaws, recommending that Petitioner file his demand dated April 21, 1965 (A-24).

On January 25, 1966, the said International Executive Board of Respondent AFM got around to action on Petitioner's demand and claim. On February 9, 1966, said Board rendered its "Award" denying Petitioner's claim (A-24). This action was taken on the basis of the minutes of the two hearings conducted, as shown above, by The Executive Board of Respondent, Local 802 (A-27 through 55).

There was no hearing nor oral argument before this Board of "arbitrators", each of whom had the conflicting roles of "impartial *arbitrator*" and Petitioner's "representative".

Petitioner's then attorney, apparently deeming Article 9's protracted procedure a purely spurious "arbitration" A-70 ff), did not move to vacate the award. Instead, prompted by Title I, § 101 (a) (4) of the Labor-Management Reporting and Disclosure Act of 1959 (*supra*, p. 3) he resorted to the Courts, after having so unsuccessfully exhausted intra-union remedies from July 1, 1964, to February 9, 1966.

Thus, petitioner in May, 1966, instituted *Aless* v. *Columbia Broadcasting System, Inc.* in the Supreme Court of the State of New York, County of New York. This action was removed to the United States District Court for the Southern District of New York, where it was entitled *Anthony Allessandrini a/k/a Tony Aless* v. *Columbia Broadcasting System, Inc.*, 66 Civil 1708.

On February 7, 1969, Judge Harold Tyler granted defendants' motion for summary judgment on the basis of the unreported decisional judgment reproduced on A-61 through A-74.

Petitioner asked his then attorney to appeal from that decision. But by reason of said attorney's oversight, no timely notice of appeal was filed; and the right to appeal was therefore lost.

Eventually, petitioner consulted his present attorney, who recommended the instant action against respondent Unions, based on their unfair representation of petitioner. Respondents promptly moved for summary judgment on the basis of collateral estoppel, because of Judge Tyler's aforesaid decision.

Judge Motley granted summary judgment in favor of Respondents on July 30, 1970. Judgment was entered August 3, 1970 (A-108 through A-114).

On August 26, 1970, petitioner filed his notice of appeal (A-115) to the United States Court of Appeals for the Second Circuit, whose decision appears in the Appendix to this Petition.

Reasons for Granting the Writ

1. There has developed in many Federal Courts a tendency to dilute or snuff out by recourse to a variety of technicalities the just and salutory principles for the protection of union members as enunciated by this Court in *Vaca* v. *Sipes*, 306 U.S. 171 (1967) and *Czosek* v. *O'Mara*, 90 S. Ct. 770 (1970). As a result, remedies against unfair representation have been denied to union members or largely curtailed, even in cases, like the instant one, where the unfair representation assumed unprecedented and extremely gross dimensions. The burgeoning law of unfair representation needs, therefore, a new, more practical and specific judicial restatement to right the balance against relatively impecunious union members who confront powerful incumbents in union office, well financed, adroitly aided by expert counsel, and often backed by political

power. Otherwise, *Vaca* and *Czosek* will become for union members a merely ineffectual verbalization against the type of union misconduct which this case exemplifies, and which other cases and many news dispatches increasingly report. The lower court cases show many unresolved conflicts in the law of unfair representation.

2. The courts have in recent years expanded the doctrine of collateral estoppel in a manner and to an extent which significantly modifies such classic statements as those contained in *Cromwell* v. *County of Sac*, 94 U.S. 351, 352-353 (1878) and *Lawlor* v. *National Screen Service Corp.*, 349 U.S. 322, 326 (1955). It is respectfully submitted that the time is now ripe for an authoritative restatement of the law of collateral estoppel in relation to unfair representation cases. The instant case provides an apt occasion for this, since here a merely technical rule is opposed as a shield to grievous wrong-doing by the officers of Respondent Unions.

3. Judge Tyler's decisional judgment in 66 Civil 1708 held "that the arbitration award is final and binding" (A-113, A-114). He did not, of course, consider the aspect of that award, and of the "arbitration" process leading to it, which is crucial to the instant case and petition; viz., the fact that *this very "arbitration" and "award" constitute and illustrate the Respondents' wrong-doing and unfair representation.*

An arbitration and award can be considered merely as such and as Judge Tyler considered them in his decision (A-61 through A-74). Taking them at face value and as the words themselves commonly signify, Judge Tyler's decision is understandable.

But the "arbitration" and "award" in this case can, and for the purposes of this petition should, be examined and considered as Union conduct to be appraised under

the standards and principles of fair and unfair representation by statutory representatives. Thus viewed, it is petitioner's contention that the "arbitration" and "award", to which the complaint here refers, are *examples* and *proofs* of Respondents' *unfair representation.*

The distinction here indicated has its analogy in the word, "trial", as ordinarily construed. So considered, it signifies something which implies or embraces no wrong-doing. But it is conceivable that in a particular case a *trial* could exemplify and demonstrate wrong-doing:—by a lawyer, or juryman or even a judge. And the record of the trial might disclose this. A trial or arbitration might, as shown by its record, establish *X* or reveal evidence proving *Z*. If, in such case, the arbitrator or judge deliberately disregards the evidence; and draws from it an alien conclusion to suit his prepossessions, the record would reveal the wrong-doing. It serves no rational purpose to build a record with due process, if the judge or arbitrator be permitted to disregard that record completely and to predicate judgment on matters outside the record. *Ohio Bell Telephone Co.* v. *Public Utilities Commission of Ohio*, 301 U.S. 292 (1937); *Morgan* v. *United States*, 304 U.S. 1 (1938); *Railroad Commission* v. *Pacific Gas & Electric Co.*, 302 U.S. 388 (1938).

That is precisely what Respondents did in this case. They developed a record which proved; without contradiction, one thing. Then they disregarded the record and its evidence in order to reach a conclusion contradictory of, and utterly unjustified by, the record, *i.e.*, the testimonial evidence and the clear meaning of the applicable labor contracts. What is involved here is not an appraisal or weighing of evidence *pro* and *con*. There was no evidence *con* (A-26 through A-55). Yet Respondents ruled as if there were (A-24).

That, Petitioner submits, is misconduct by Respondents which amounts to gravely unfair representation.

Such unfair representation is not mitigated nor immunized from criticism by the fact that in an earlier proceeding, and in a different case, a District Court granted summary judgment against petitioner and in favor of CBS, based on the same "arbitration" by Respondents (who at that time were not challenged with unfair representation on the basis of that "arbitration"). Arbitration statutes do not provide for vacation of awards because of unfair representation by unions. The distinction here made has not been made in any other case coming to the attention of counsel for Petitioner. Yet it is a significant distinction in the development of the nationally important law of unfair representation and in the fulfillment of the beneficient purposes behind that law as enunciated in *Vaca* and *Czosek*.

4. The issues raised by the complaint in Judge Tyler's case (A-61 through A-74) and by the complaint in the instant case are substantially different. In 66 Civil 1708, the issue was whether CBS had violated relevant labor contracts. Here the issue is whether Respondents violated their duty fairly to represent petitioner in view of the utterly unjustifiable manner in which they conducted the "arbitration". Just because Respondents conducted something they called an "arbitration" is no reason to assume that they were or were not guilty of unfair representation *in doing so*. Petitioner, by his complaint here, sought the opportunity to prove that Respondents' conduct of the "arbitration" and their "award" provide sound reasons and firm ground for concluding that Respondents violated said duty.

Such distinctions and issues are important especially in view of the Unions' peculiar national control of "arbitrations". Thus, the Court of Appeals was in error in ruling that petitioner here "seeks to relitigate by a charge of breach of fiduciary relationship, the very issue of the validity of the award". There never was any previous

litigation of the question whether Respondents' conduct in arranging the "arbitration" or in making the "award" constituted unfair representation. Therefore, that issue could not be "relitigated".

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

June , 1971.

Respectfully submitted,

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(APPENDIX)

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 361—September Term, 1970
(Argued January 11, 1971 Decided March 18, 1971)
Docket No. 35417

ANTHONY V. ALLESSANDRINI, a/k/a TONY ALESS,
Plaintiff-Appellant,

v.

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA and ASSOCIATED MUSICIANS OF GREATER NEW YORK, LOCAL 802, AFM, AFL-CIO,
Defendants-Appellees.

Before:

WATERMAN, FRIENDLY and KAUFMAN,
Circuit Judges.

Appeal from judgment, United States District Court for the Southern District of New York, Motley *J.*, dismissing plaintiff-appellant's complaint. Judgment affirmed.

GODFREY P. SCHMIDT, New York City, for Appellant.

STEPHEN C. VLADECK, JUDICK P. VLADECK, VLADECK, ELIAS, VLADECK & LEWIS, New York City, for Appellee American Federation of Musicians.

ASHE & RIFKIN, New York City, for Appellee Local 802.

Opinion of Court of Appeals

PER CURIAM:

In 1966 plaintiff, claiming that he had been underpaid during the tenure of his employment by the Columbia Broadcasting System as a band conductor on the Jack Sterling radio program,[1] submitted the issue to arbitration under the aegis of the defendant unions. After a hearing, recovery was denied. No effort was made to set aside this award; rather, plaintiff instituted suit in a New York court against C.B.S. in which he sought substantially the same relief. The case was removed to the United States District Court for the Southern District of New York where Judge Tyler, ruling that the arbitration award was res judicata, granted summary judgment for C.B.S. No appeal was taken from this judgment.

Plaintiff then commenced the present action against the unions charging that they breached their duty to fairly represent him in connection with the C.B.S. arbitration. Judge Motley dismissed the complaint on the grounds that plaintiff was bound, under the doctrine of collateral estoppel, by Judge Tyler's decision that the arbitration was binding and hence plaintiff's claim against C.B.S. had been foreclosed. Now, by appealing from Judge Motley's dismissal of the complaint before us, *he seeks to relitigate, by a charge of breach of fiduciary relationship, the very issue of the validity of the award,* which Judge Tyler has decided adversely against him. Since we believe that plaintiff's present claim is barred by Judge Tyler's decision, which Allessandrini failed to appeal, we need not intimate any views on the further reasons given by Judge Motley for dismissing the complaint.

Affirmed.

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[1] Plaintiff's union contract provided that a band leader would receive a salary 75 per cent greater than that of a sideman if the band consisted of six or more men including the leader; otherwise he would receive the same as a sideman. Aless was paid as a sideman. When production of the show switched from live performance to taped, plaintiff was dismissed. He claimed that as Sterling, the show's star, played the drums during every performance the band actually consisted of six men.

Opinion and Judgment of District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

69 Civ. 2280

—o—

ANTHONY V. ALESSANDRINI, a/k/a TONY ALESS,

Plaintiff,

against

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA and ASSOCIATED MUSICIANS OF GREATER NEW YORK, LOCAL 802, AFM, AFL-CIO,

Defendants.

—o—

Appearances:

GODFREY P. SCHMIDT, 55 West 42nd Street, New York, New York 10036, Attorney for Plaintiff.

VLADECK, ELIAS, FRANKLE, VLADECK & LEWIS, By STEPHEN C. VLADECK, 165 West 46 Street, New York, New York 10036, Attorneys for Defendant (AFM).

ASHE & RIFKIN, 253 Broadway, New York, New York 10007, Attorneys for Defendant (Local 802).

CONSTANCE BAKER MOTLEY, *D. J.*

Plaintiff Alessandrini is an orchestra leader and music arranger. He was employed by the Columbia Broadcasting System, Inc. (CBS) as a leader or conductor of a band on the Jack Sterling Radio Show from February 22, 1954 to July 4, 1964 when live music was discontinued. (Pl.'s Exh. E, p. 3 of 12/24/64 hearing, attached to complaint.) The terms and conditions of his employment were at all times governed by agreements between defendant, Asso-

ciated Musicians of Greater New York, Local 802, AFM, AFL-CIO (Local 802) of which plaintiff was and is a member in good standing, as well as agreements between CBS and the other defendant, the American Federation of Musicians of the United States and Canada (AFM). The agreements provided that the leader or conductor of a band of six men (including the leader or conductor) was to be paid 75% more than the regular salary of a sideman in such a band.

Plaintiff alleges that during the entire period of his employment, he was paid the salary of a sideman rather than the salary of a leader, to which he was entitled under the agreement.

Plaintiff's band consisted of 5 men, including himself, but the star of the show, Jack Sterling, often played the drums along with the instruments played by the 5 band members. His claim, therefore, is that his band actually consisted of six men, instead of five, because Jack Sterling often played the drums during each performance of the ten year span.

After termination of his employment by CBS in July 1964, plaintiff made a demand on CBS for payment of $163,393.05, the amount which he claimed was due him as a result of underpayment for the period involved, plus $990.50 for single engagements.

On December 17 and 24, 1964, a hearing on plaintiff's claim against his employer was held by the Trial Committee of Local 802. (Pl's Exh. E attached to complaint.) Plaintiff was represented by counsel. A number of witnesses testified on behalf of plaintiff that Jack Sterling performed on the drums during the shows but did not attend rehearsals. An effort to amicably settle the dispute at this level apparently failed.

Thereafter, in April 1965, plaintiff submitted his claim to arbitration by the AFM. On January 25, 1966, the

International Executive Board of AFM made an award in which it denied plaintiff's claim.

Plaintiff did not thereafter take any action to have the award set aside under either state or federal law. Instead, in May 1966, he instituted a suit in the Supreme Court of New York, New York County, against CBS. The case was thereafter removed to this Court by defendants who moved for summary judgment for dismissal on the ground that the AFM arbitration award was final and binding and, therefore, res judicata as to that action. In an opinion filed on February 7, 1967, this Court (Tyler, J.) agreed and dismissed the complaint. *Alessandrini* v. *Columbia Broadcasting System, Inc.*, 66 Civ. 1708 unreported.

The instant action was filed on May 27, 1969. In the first cause of action, plaintiff alleges that in connection with his claim against CBS, defendants breached their statutory duty to him of fair representation. *Vaca* v. *Sipes*, 386 U.S. 171 (1967). It is claimed that the arbitration proceedings were not genuine arbitration proceedings. It is also claimed that as a result of defendants' breach of their statutory duty of fair representation, CBS improperly discharged plaintiff, a claim not previously made to the union or at the time plaintiff presented his claim for wages due. In 1964, at the Trial Committee hearing of Local 802, plaintiff stated that his employment was terminated when live music was discontinued by CBS on the Jack Sterling Show.

In a second cause of action it is alleged that defendants breached their contracts with plaintiff (the Constitution and By-Laws of defendants being contracts between them and their members) by their actions with respect to his claim against CBS.

A third cause of action claims that the requirement that union members exhaust all their internal remedies before proceeding in court "against any member, local,

or the Federation" denies, in effect, the right of members to sue in the courts and that this requirement defeated plaintiff's right to sue CBS in the action instituted by plaintiff in the state court.

A fourth cause of action claims that defendants, in violation of section 101(a)(5) of the Labor Management Reporting and Disclosure Act, providing safeguards against improper disciplinary action against union members by the union, the defendant unions here "otherwise disciplined" plaintiff by the action complained of in the instant complaint.

Plaintiff seeks a judgment against the defendants on each cause of action for $250,000 in damages.

Defendants have moved to dismiss the instant action on the ground that Judge Tyler's decision is res judicata with respect to this action or *plaintiff is collaterally estopped from relitigating in this action his claim against CBS.*

The suit against CBS sought to recover damages for alleged breach of conditions of plaintiff's employment under and pursuant to collective bargaining agreements between defendants and CBS. Recovery by plaintiff in his present action, which is essentially that defendants breached their contracts with plaintiff and breached their statutory duty of fair representation, would entail a relitigation of the question whether CBS breached its contract with defendants by failing to pay plaintiff at the rate payable to a leader as opposed to a sideman during his employment from 1954 to 1964. The arbitration award settled that issue against the plaintiff.

This Court has already held, TYLER, *J.* as set forth, *supra,* that the arbitration award is final and binding. No appeal was taken from Judge Tyler's decision. Judge Tyler ruled that plaintiff, having availed himself of the contractual remedies set forth in the arbitration article which

therein are stipulated to be final and binding, "cannot ignore those proceedings and bring . . . suit to obtain the very relief which the arbitration board denied him. See generally, *United Steelworkers of America v. Warrior & Gulf Navigation*, 363 U.S. 574, 578-579 (1960); *Nix* v. *Specter Space System, Inc.*, 264 F.2d 875 (3rd Cir. 1959); *Local 453, International Union of Electrical, Radio & Machine Workers*, 314 F.2d 25, 28 (2d Cir. 1963)."

Plaintiff is, therefore, collaterally estopped from relitigating that issue in this action. Lawlor v. *National Screen Service Corp.*, 349 U.S. 322, 326 (1955) (dictum); *United States* v. *United Air Lines, Inc.*, 216 F. Supp. 709 (E.D. Wash. 1942); *aff'd and modified on other grounds*, 335 F.2d 379 (9th Cir. 1964), *cert. dismissed*, 379 U.S. 951.

The motion for summary judgment as to the issue of collateral estoppel is, therefore, granted.

Dated: New York, New York
July 30, 1970

SO ORDERED.

CONSTANCE BAKER MOTLEY
U. S. D. J.

Judgment entered—8/3/70
JOHN LIVINGSTON
Clerk

Article 9 of Respondent AFM By-Laws

ARTICLE 9—CLAIMS AND ARBITRATIONS

SECTION 1. A member of the Federation shall at all times have the right to sue or make claim through his local union or the Federation, as the case may be, against any leader, agent, employer or whoever it may be, for any amount resulting from failure to receive his salary, for violation of contract or agreement, or for any difference in price actually received by him for an engagement and the price established by his local union or the Federation for same.

SECTION 2. Neither the Federation nor any local shall enforce a claim against any member unless same is connected with or arises from the profession of music as engaged in, practiced and carried on by members of the Federation.

SECTION 3. All claims against defaulting employers must be filed with the International Secretary-Treasurer within three months after the default occurs. A leader who fails to comply with this law may be held personally responsible for full payment of all money due members of his orchestra and may not be entitled to the assistance and protection of the Federation, but such failure of the leader shall not absolve the defaulting employer.

SECTION 4. A claim referred to the Federation for collection against an employer for non-payment of salaries, breach of contract, or any other valid reason whatsoever cannot be settled privately between appellant and defendant unless the Federation agrees to same.

SECTION 5. Locals are privileged to take whatever action and means available, even to the restraint of all further service, in their efforts to obtain collection of moneys due, providing a careful investigation has been made and no

doubt exists with the Federation as to the validity of the claim.

SECTION 6. Every agreement or contract covering, dealing with, relating to, or affecting the performance of services as a musician by a member of the American Federation of Musicians (including but not limited to agreements or contracts providing for management or booking services for such member or engagements or employment for such member) shall be deemed to include the following provisions:

(A) Every claim, dispute, controversy or difference (all of which are herein called "grievance") arising out of, dealing with, relating to, or affecting the interpretation or application of this contract or the violation or breach or threatened violation or breach thereof, whether between (1) an employee who is a member of the American Federation of Musicians (herein called "Federation") and the employer or purchaser of services hereunder, (2) such member and the booking agent of the engagement provided for hereunder, (3) such employer or purchaser and such booking agent, or (4) two or more booking agents shall be heard, adjudicated and determined as follows:

(1) If any such grievance involves or relates to booking agents, traveling bands, recording, radio or television activities, or any other matter within the sole competence of the Federation pursuant to its Constitution, By-laws, rules or resolutions, as distinguished from matters within the competence of the locals thereof, it shall be adjudicated and determined only by the International Executive Board of said Federation (herein called "Board").

(2) Any other such grievance shall be initially adjudicated by the person, persons or body specified by the rules, By-laws or practices of the local of said Federation in whose jurisdiction the services have been or are

Article 9 of Respondent AFM By-Laws

to be performed, in accordance with the procedures adopted in such rules or By-laws or adhered to under such practices. Any party to such local adjudication may appeal from the determination thereof to the Board within thirty days from the date on which such party is notified of such local determination or within such additional time as the President of the Federation or the Board may specify. On such appeal, the President of the Federation may stay the award local person, persons or body and, in its discretion, may receive additional evidence from any party. Pending such appeal, the President of the Federation may stay the award on such terms and conditions as may be deemed proper, including but not limited to the deposit of adequate security with the Federation.

(3) The award of the Board on any grievance submitted to it in accordance herewith, whether in the first instance or on appeal from the decision of such local person, persons or body shall be final and binding upon all parties. The award of such local person, persons or body in any adjudication from which an appeal is not taken to the Board as above provided shall be final and binding upon all parties.

(B) The failure to perform (or the breach of any other type) of any contract or agreement, between such member and such employer or purchaser of services, or between such member and such booking agent, or between such employer or purchaser of services and such booking agent, by any party to such contract or agreement shall not have the effect of terminating the obligations, under the provisions of this Section 6, of such party or of any adverse party or of any other party to such contract or agreement. Such failure to perform or such breach of any other type, since it is included within the definition of "grievance" shall be heard, adjudicated and determined as provided in this Section 6 upon the request or demand of any party.

Article 9 of Respondent AFM By-Laws

(1) The adjudication of grievances before the Board under the provisions of this Section 6 shall be the sole and exclusive remedy for breach of contract by employees (or performers of services), employers (or purchasers of services) and booking agents.

(2) As used in the Section 6, the term "booking agent" shall include a booking agent, an agent, a personal representative, a manager, a personal manager and a promoter.

(3) A partial performance, or acts in lieu of performance of an award issued pursuant hereto shall not constitute satisfaction of such award even though accepted as such by the party entitled to performance under the award unless such agreement, settlement or compromise shall be approved by the person, persons or body issuing the award.

(C) Each party so required to settle grievances hereby:

(1) agrees that said Board shall have jurisdiction to determine whether any matter upon which determination has been demanded constitutes such a claim, dispute, controversy or difference dealing with, relating to or affecting the rendition of services performed or to be performed hereunder by any member of the American Federation of Musicians, or providing management or booking services for such member, or providing engagements or employment for such member; and whether such claim, dispute, controversy or difference involves or is related to a matter within the sole competence of the Federation pursuant to its Constitution, By-laws, rules or resolutions as distinguished from matters within the competence of locals thereof;

(2) waives the taking by the members of the Board of any arbitrator's oath required by law;

(3) consents to the introduction and submission of evidence to the Board in the form of unsworn written state-

ments, and waives the taking of oral testimony and the presentation of oral argument before the Board;

(4) agrees that the Board shall not be bound by rules of law nor by rules of evidence prescribed by any court or administrative agency;

(5) consents to the consideration of evidence and to the making of any award by the members of the Board severally without the holding of a conference;

(6) agrees that any award may be made by a majority of the members of the Board voting thereon and that notice of any award of the Board signed by the Secretary-Treasurer of the Federation or an assistant designated by him shall constitute the formal award of the Board, neither notarization, acknowledgment nor certification being necessary, but that the Board in its discretion may issue an award signed and acknowledged by the Secretary-Treasurer of the Federation or his designated assistant and may do so at any time and even though notice of the award signed by said Secretary-Treasurer or his designated assistant has already been issued;

(7) agrees that the courts of the State of New York and of the state in which any party to such submission resides shall have jurisdiction over such parties to adjudication in reference to any matter arising out of any adjudication held pursuant hereto, including but not limited to the confirmation of the award of the Board and the enforcement thereof by entry of judgment thereon or by any other legal remedy, and that an award of the Board may be enforced as either the award of a common law proceeding or of a statutory procedure; *and any court in Canada of competent jurisdiction in the Province, County or District in which any party to such submission resides shall have jurisdiction as aforesaid and the law of such Province shall apply;*

Article 9 of Respondent AFM By-Laws

(8) agrees that the mailing (registration being unnecessary) by the Secretary of the Federation of any demand for adjudication, notice of hearing or any other notice, or of any other paper connected with a proceeding pursuant to this Section 6 of Article 9 or with such a judicial proceeding, properly addressed and with prepaid postage, shall constitute due and proper service of such demand or paper;

(9) agrees that any adjudication by the Board shall be conducted in accordance with such rules as said Board may adopt from time to time;

(10) agrees that the Board may, in making any adjudication, take into account the customs, practices, standards and conditions of the industries, trades or professions in which musicians perform, of which the members of the Board have knowledge without the necessity of any evidence with respect thereto being adduced in the proceeding before the Board.

SECTION 7. Where the plaintiff or the defendant introduces evidence of unusual or great volume, the International Secretary-Treasurer shall have authority to insist that fifteen copies of said evidence be furnished for the purpose of preparing the claim for the International Executive Board.

SECTION 8. Where the Board has rendered its initial award in an arbitration proceeding, whether or not upon the default of any party, any party to the proceeding may request a reopening of that initial award upon the ground of prejudicial error or to submit new evidence, not available at the prior proceeding. An application for a reopening must be submitted in writing to the International Secretary-Treasurer not later than 90 days after the date of the Board's award, and shall set forth the evidence relied upon. The International Secretary-Treasurer, in his discretion, may grant or deny the application after reviewing the evidence submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-293

ANTHONY V. ALLESSANDRINI, a/k/a TONY ALESS,
Petitioner,

v.

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA and ASSOCIATED MUSICIANS OF GREATER NEW YORK, LOCAL 802, AFL-CIO,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF RESPONDENT, AMERICAN FEDERATION OF MUSICIANS, IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals for which review is sought is printed in the Appendix to the Petition (pp. 1a-2a). The opinion and judgment of the District Court for the Southern District of New York is also set forth in the Appendix to the Petition (pp. 3a-7a).

The prior Decision and Order of the District Court for the Southern District of New York in *Allessandrini, a/k/a Tony Aless* v. *Columbia Broadcasting System,* 66 Civ. 1708 (unreported) on the basis of which the instant action was dismissed, is set forth in the Appendix in the Court of Appeals. A-61-74.

QUESTIONS PRESENTED

Petitioner's statement of the questions presented to the Court obscures rather than clearly states the issues. The questions presented are the following:

1. Did the Court below correctly affirm the dismissal of the complaint, having found that under the doctrine of collateral estoppel the claim was barred by a prior decision?

2. Did the Court below correctly refuse to permit a charge of breach of the duty of fair representation to overcome the bar of the arbitration award and the prior litigation?

STATUTORY PROVISIONS INVOLVED

Petitioner refers to Section 101(a)(4), Labor-Management Reporting and Disclosure Act of 1959. The provision was not cited by Petitioner in the Court below, although it was referred to in the complaint. Neither that section or any other statutory provision is relevant to any issue raised herein.

FACTS

The facts are accurately set forth in the opinion of the Court of Appeals (A. 2a),* and at length in the opinion of the District Court (A. 3a-5a).

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* References, unless otherwise noted, are to Appendix to Petition.

ARGUMENT

Since there is no conflict concerning the law applicable to this case, and since the decision of the Court of Appeals is correct, there is no reason for further review.

Petitioner views this case as a vehicle for obtaining from the Court a restatement of the law of collateral estoppel. Even if such restatement was timely, this case does not provide a basis for reexamining the law. The decision below rests entirely on the facts and cannot affect other litigants.

1. The doctrine of collateral estoppel, contrary to Petitioner's statement, was not applied by the Court below in other than its traditional fashion, that of foreclosing repeated litigation of the same issue. Even in *Lawlor* v. *National Screen Service Corp.*, 349 U.S. 322, relied on by Petitioner, the doctrine of collateral estoppel was held sufficient to prevent "relitigation of the issues actually litigated and determined in a prior suit, regardless of whether it was based on the same cause of action as the second suit" (at p. 326).

2. Petitioner's reference to the developing law of unfair representation does not affect the application of the bar of collateral estoppel. The Court below correctly held that Petitioner was seeking "to relitigate, by charge of breach of fiduciary relationship, the very issue of the validity of the award which Judge Tyler had decided adversely against him" (Opinion, Court of Appeals, A. 2a).

The introduction of the argument concerning the duty of fair representation was an effort to attack collaterally an arbitration award which Petitioner had never sought to set aside and which had been held,

in the first suit, to be binding upon him. All applicable law supports the decision of the Court of Appeals in affirming the District Court's finding that the decision of Judge Tyler in the first action precluded further litigation upon the same facts and the same issues.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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